## Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-09–161–04 OF 2016
DAVID WONG, ZAWAWI SALLEH AND ZAMANI A RAHIM JJCA
22 FEBRUARY 2017

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*Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged and convicted for offence of consumption of drug under s 15(1)(a) of the Dangerous Drugs Act 1952 read together with s 38B of the same Act — Whether 'Inspector General's Standing Orders F103' and 'Kementerian Kesihatan Malaysia Guidelines Bilangan 6/2002' had the force of law — Whether appellant accorded with fair trial — Dangerous Drugs Act 1952 ss 15(1)(a), 31A, 38B — Drug Dependants (Treatment and Rehabilitation) Act 1983 s 31 — Federal Constitution arts 5 & 8 — Police Act 1967 s 97*

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The appellant was charged at the magistrate court with an offence of consumption of drug under s 15(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') read together with s 38B of the same Act. At the end of the prosecution's case, the magistrate found that prima facie case was established against the appellant. The appellant chose to remain silent, hence the magistrate convicted the appellant of the offence and sentenced him to seven months imprisonment. On appeal, the High Court affirmed the decision of the magistrate, hence the present appeal. The appeal revolved around the facts that only one bottle of urine sample was collected from the appellant by the police for screening purposes. The appellant argued that two bottles of urine sample were required based on 'Inspector General's Standing Orders F103' ('IGSO F103') and 'Kementerian Kesihatan Malaysia Guidelines Bilangan 6/2002' ('the guidelines'). It must be noted that, at the trial stage, the learned judicial commissioner ('JC') held that the collection of urine sample from drug dependents for examination was governed by s 31A of the DDA and the said provision was silent on the taking of two bottles of urine sample and its test procedures. It was further ruled that the IGSO F103 was irrelevant and it did not bind the court in arriving at its findings. In the present appeal, the issue for court's determination was whether the IGSO F103 and the guidelines had the force of law.

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**Held**, allowing the appeal; setting aside the appellant's conviction and sentence; and acquitting and discharging the appellant:

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(1) The standing orders made by the Inspector-General of Police, which necessarily include the IGSO F103 acquires its statutory power from s 97 of the Police Act 1967. Therefore, it has the force of law. The guidelines

under the caption 'Urine Collection' has made reference to the DDA. The scheme of the guidelines was formulated in collaboration with the DDA and also the Drug Dependants (Treatment and Rehabilitation) Act 1983. As the guidelines was formulated in line with both the aforesaid Acts, it therefore has the force of law (see paras 39–40 & 42).

(2) It must be noted that s 31A of the DDA is a general provision dealing with the arrested person to provide a specimen of the urine for the purposes of an examination. Whilst the IGSO F103 and the guidelines are specific standing orders and guidelines dealing with the procedures for collecting and testing of drugs abuse in urine (see para 47).

(3) On the facts of the case, a constitutional guaranteed right of the appellant had been transgressed. The appellant was deprived of the procedural law which gives him the right of a second test. The ruling of the magistrate and the learned JC that one bottle of the appellant's urine sample was sufficient, was contrary to the IGSO F103 and the guidelines. The appellant, accordingly, did not have a fair trial and arts 5(1) and 8(1) were violated. He had lost a chance of being acquitted which was reasonably opened to him. Thus, justice had been miscarried — commonly called 'miscarriage of justice'. In totality, the appellant's conviction was erroneous and not safe (see paras 49–51).

**[Bahasa Malaysia summary**

Perayu dituduh di mahkamah majistret dengan kesalahan penggunaan dadah di bawah s 15(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dibaca bersama s 38B Akta yang sama. Di akhir kes pendakwaan, majistret mendapati bahawa kes prima facie telah dibuktikan terhadap perayu. Perayu memilih untuk kekal berdiam diri, maka majistret menyabitkan perayu terhadap kesalahan dan menjatuhkan hukuman penjara tujuh bulan. Atas rayuan, Mahkamah Tinggi mengesahkan keputusan majistret, maka rayuan ini. Rayuan berkisar atas fakta bahawa hanya satu botol sampel air kencing diambil daripada perayu oleh polis bagi tujuan pemeriksaan. Perayu berhujah bahawa dua botol sampel air kencing dikehendaki atas 'Inspector General's Standing Orders F103' ('IGSO F103') dan 'Kementerian Kesihatan Malaysia Guidelines Bilangan 6/2002' ('garis panduan tersebut'). Ia perlu diambil perhatian bahawa, di peringkat perbicaraan, pesuruhjaya kehakiman yang bijaksana ('PK') memutuskan bahawa pengambilan sampel air kencing daripada penagih dadah untuk pemeriksaan dikawal s 31A ADB dan peruntukan tersebut adalah senyap mengenai pengambilan dua botol sampel air kencing dan prosedur-prosedur ujiannya. Ia selanjutnya diputuskan bahawa IGSO F103 tidak relevan dan tidak mengikat mahkamah dalam mencapai kepada dapatannya. Dalam rayuan ini, isu untuk penentuan mahkamah adalah sama ada IGSO F103 dan garis panduan mempunyai kuasa undang-undang.

**Diputuskan**, membenarkan rayuan; mengenepikan sabitan dan hukuman

perayu; dan membebaskan dan melepaskan perayu:

(1) Perintah tetap yang dibuat oleh Ketua Polis Negara, yang mana perlu memasukkan IGSO F103 memperolehi kuasa berkanun daripada s 97 Akta Polis 1967. Oleh itu, ia mempunyai kuasa undang-undang. Garis panduan di bawah kapsyen 'Urine Collection' telah membuat rujukan kepada ADB. Skim garis panduan telah dirangka dengan ADB dan juga Akta Penagih Dadah (Rawatan dan Pemulihan) 1983. Memandangkan garis panduan dirangka selaras dengan kedua-dua Akta tersebut, oleh itu mempunyai kuasa undang-undang (lihat perenggan 39–40 & 42).

(2) Ia perlu diambil perhatian bahawa s 31A ADB adalah peruntukan am berurusan dengan orang yang ditangkap untuk memberikan spesimen air kencing bagi tujuan pemeriksaan. Sementara IGSO F103 dan garis panduan adalah perintah-perintah khusus dan garis panduan berurusan dengan prosedur-prosedur bagi mengambil dan menguji penyalahgunaan dadah di dalam air kencing (lihat perenggan 47).

(3) Atas fakta kes, hak terjamin perlembagaan perayu telah melampaui batas. Perayu dinafikan undang-undang prosedur yang memberinya hak kepada ujian kedua. Keputusan majistret dan PK yang bijaksana bahawa satu botol air kencing perayu adalah memadai, adalah bertentangan IGSO F103 dan garis panduan. Perayu, dengan itu, tidak mendapat perbicaraan yang adil dan perkara 5(1) dan 8(1) telah dicabuli. Dia kehilangan peluang dibebaskan yang mana adalah secara munasabah terbuka kepadanya. Oleh itu, keadilan telah salah dilaksanakan biasanya dipanggil 'miscarriage of justice'. Secara keseluruhan, sabitan perayu adalah salah dan tidak selamat (lihat perenggan 49–51).]

**Notes**

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

**Cases referred to**

*Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232, FC (refd)
*Erivesto Anderson & Anor v PP* [2009] 1 MLJ 593, FC (distd)
*K Saravanan a/l S Karuppiah v PP* [2002] 3 MLJ 465, CA (distd)
*Lee Kwan Woh v PP* [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
*Mohamad Yazri bin Minhat v PP* [2003] 2 MLJ 241, CA (refd)
*Mraz v The Queen* (1955) 93 CLR 493, HC (refd)
*Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors, Re* [1977] 2 MLJ 108, FC (refd)
*R v Turnbull and others* [1976] 3 All ER 549, CA (refd)
*Unilever (M) Holdings Sdn Bhd v So Lai @ Soo Boon Lai & Anor* [2015] 4 MLJ 326, FC (distd)

**Legislation referred to**

Federal Constitution arts 5(1), 8(1)
Dangerous Drugs Act 1952 ss 15, 15(1)(a), 31A, 37(j), (k), 38A, 38B, 38B(1)
Drug Dependants (Treatment and Rehabilitation) Act 1983 s 31
Police Act 1967 s 97

**Appeal from**: Criminal Trial No 41S-01–06 of 2015 (High Court, Temerloh)

*Richard Bong (Bong & Co) for the appellant.*
*Jasmee Hameeza bt Jaafar (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Zamani A Rahim JCA:**

INTRODUCTION

**[1]** Noor Shariful Rizal bin Noor Zawawi, the appellant, was charged with an offence of self-administration or consumption a dangerous drug, to wit, methamphetamine under s 15(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s 38B(1) of the same Act. The amended charge reads as follows:

> The Amended Charge
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> Bahawa kamu pada 23hb Jun 2014, jam lebih kurang 7.00 petang di Balai Polis Temerloh, di dalam Daerah Temerloh, di dalam Negeri Pahang Darul Makmur, telah didapati menggunakan dadah berbahaya jenis methamphetamine ke dalam tubuh badan kamu dengan cara menyalahi undang-undang. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 15(1)(a) Akta Dadah Berbahaya 1952 dan dibaca bersama seksyen 38B(1) Akta yang sama.

BACKGROUND FACTS

**[2]** The background and material facts that culminate in this appeal are as follows.

**[3]** On 23 June 2014, at about 6.30pm, Ketua Bahagian Siasatan Jenayah Narkotik, Daerah Temerloh, ASP Woon Khoon Ming, PW1 and seven of his men detained the appellant at the football field of a police housing area at Temerloh Jaya. The appellant was suspected to be involved in the abuse of drugs.

**[4]** After his detention, the appellant was taken to Temerloh Police Station where he was given the liberty to choose the bottle — one bottle only. He was

directed by PW1 to give his urine sample in the said bottle for screening purposes. Having carried out the screening test, it was found to contain methamphetamine. The same bottle containing the balance of the appellant's urine sample was closed and sealed up by PW1. PW1 then gave the said bottle to the investigating officer, Insp Letter Lee, PW4, for onward transmission to the hospital for confirmation test.

**[5]** On 25 June 2014, PW4, handed over the urine sample to the Pathology Department, Kuala Lumpur Hospital for confirmation test. Having conducted the test, *pegawai sains kimia hayat*, Muhammad Nubli Mohd Shuhaimi, PW3, confirmed that the appellant's urine sample was found to contain methamphetamine. PW3 prepared his report 'Laporan Ujian Pengesanan Dadah Dalam Air Kencing' and produced at the trial as exh P9.

**[6]** At the close of the prosecution's case, the magistrate found that the prosecution had succeeded in establishing a prima facie case under s 15(1)(a) of the Act against the appellant. The appellant was called to enter his defence.

**[7]** Having explained the three options opened to him to put up his defence, the appellant chose to remain silent. He was found guilty, convicted and sentenced to seven months imprisonment commencing from the date of his arrest and also he was imposed by the magistrate to undergo police supervision for a period of two years.

**[8]** Dissatisfied with the decision of the magistrate, the appellant took up an appeal to the High Court at Temerloh. On hearing the appeal, learned judicial commissioner ('JC') affirmed the decision of the magistrate. Hence this appeal.

**[9]** As regards to the appellant's appeal before learned JC, the central issue was relating to the procedure of collecting urine sample of the appellant which was alleged to be in contravention of the '*Perintah Tetap Ketua Polis Negara* F103 (PTKPN F103)' or its English version called 'Inspector General's Standing Orders F103 (IGSO F103)' and 'Kementerian Kesihatan Malaysia Guidelines Bilangan 6/2002 (KKM Guidelines Bilangan 6/2002)'.

FINDINGS OF THE HIGH COURT

**[10]** Learned JC was of the opinion that the collection of the urine sample from the suspected drug defendants for an examination is governed by s 31A of the Act.

**[11]** If any dangerous drug is detected in the suspected person's urine, the presumption of consumption or self-administration under s 37(k) shall be activated, that is to say, the person shall be presumed, until the contrary is

proved, to have consumed the drug or to have administered the drug to himself in contravention of the Act or its regulations.

**[12]** Learned JC went on to make a further finding that there was no provision in s 31A of the Act that the urine sample must be collected in two bottles — the first bottle for screening test and the second bottle for confirmation test by the pathology department.

**[13]** Learned JC said that the IGSO F103 and the KKM Guidelines Bilangan 6/2002 which stated that the urine sample must be taken in two bottles did not bind the court. Its non-compliance would not affect or jeopardise the prosecution's case. His Lordship in his judgment at p 12 para 22 said as follows:

> Sungguhpun di dalam kes di atas isu yang menjadi pertikaian adalah samada IGSO itu boleh dikemukakan di mahkamah atau tidak, ratio kes di atas berkait dengan IGSO adalah relevan dengan kes yang ada di hadapan mahkamah. Dengan menerima pakai ratio kes di atas di dalam kes di hadapan mahkamah, ianya bermakna mahkamah mestilah berpuashati bahawa pemeriksaan air kencing itu telah dibuat dengan cara yang memuaskan 'in a satisfactory manner'. Jika pun IGSO Bab F103 itu telah dipatuhi, ianya tidak bermakna bahawa ia telah mengikat mahkamah untuk mengatakan bahawa satu pemeriksaan air kencing yang dibuat berdasarkan tatacara IGSO Bab F103 adalah memuaskan. Jika ianya tidak dipatuhi, tidak bermakna mahkamah akan memutuskan keputusan ujian saringan awal dan penganalisaan oleh Pegawai Sains dan Kimia tidak sah jika prosedur pemeriksaan air kencing telah dibuat dengan teliti dan memuaskan. Di dalam ertikata lain IGSO adalah tidak relevan dan tidak mengikat mahkamah untuk membuat satu dapatan atau keputusan. Ianya bergantung kepada fakta yang ada di hadapan mahkamah.

**[14]** Learned JC also said that even though only one urine sample of the appellant was used in the confirmation test by *pegawai sains kimia hayat*, PW3, it had not prejudiced and caused injustice to him. His Lordship at p 26 of the appeal record para 51 read as follows:

> Mahkamah berpendapat prosedur pengambilan dan keputusan penganalisaan air kencing adalah teratur mengikut Akta Dadah Berbahaya 1952. Mahkamah berpuashati berasaskan kepada keterangan, tidak berlaku pencemaran terhadap specimen air kencing milik tertuduh dan isipadu specimen air kencing adalah mencukupi untuk tujuan penganalisaan oleh SP3. Justeru itu, walaupun hanya satu sampel air kencing milik tertuduh diambil, ia tidak memprejudiskan tertuduh dan tidak mendatangkan ketidakadilan kepadanya. Oleh yang demikian mahkamah ini bersetuju dengan dapatan puan majistret yang bijaksana bahawa satu kes prima facie telah dibuktikan terhadap tertuduh berasaskan kepada s 37(k) Akta Dadah Berbahaya 1952.

**[15]** In conclusion, learned JC made the findings at p 28 of the appeal record paras 54–56 as follows:

[54] Mahkamah berpendapat kegagalan untuk mematuhi IGSO Bab F103 atau Garis Panduan KKM 2012 tidak semestinya menyebabkan satu sabitan itu diketepikan. Sesuatu sabitan itu hanya boleh diketepikan jika berasaskan kepada keseluruhan keterangan, dapatan yang dibuat oleh majistret itu adalah tidak selamat atau tidak memuaskan. Di dalam kes ini mahkamah tidak nampak berasaskan kepada keterangan yang ada di hadapan mahkamah, dapatan yang dibuat oleh Majistret adalah tidak memuaskan dan tidak selamat.

[55] Selepas dipanggil membela diri, tertuduh telah diterangkan dengan tiga pilihan untuk memberi keterangan. Tertuduh memahaminya dan memilih untuk berdiam diri. Puan majistret telah membuat dapatan, setelah menimbang keseluruhan keterangan dan exhibit bahawa OKT telah gagal untuk menimbulkan sebarang keraguan yang munasabah ke atas kes pihak pendakwaan. OKT didapati bersalah dan disabitkan di atas pertuduhan. Beliau telah dihukum tujuh bulan penjara dan diletak di bawah pengawasan polis selama dua tahun.

[56] Setelah meneliti alasan penghakiman dan rekod rayuan, mahkamah mendapati tidak terdapat alasan-alasan yang munasabah untuk mahkamah ini mengganggu keputusan puan majistret. Oleh yang demikian, rayuan tertuduh terhadap sabitan ditolak. Sabitan dan hukuman ke atas tertuduh dikekalkan.

LEARNED DEPUTY'S SUBMISSION

**[16]** Learned deputy emphasised to this court the importance and relevance of three provisions of the Act. Firstly, s 15 which concerns the self-administration or consumption of drugs. Secondly, s 31A which deals with the power of the medical officer and the police officer not below the rank of Sergeant to direct an arrested person to undergo examination to provide a specimen of the urine for the purposes of an examination; and thirdly, s 37(k) which relates to the presumption of self-administration or consumption of drug.

**[17]** Learned Deputy said that the s 31A of the Act states, inter alia, *to provide a specimen of his urine for the purposes of an examination*. She reminded us that the provision of s 31A of the Act says that only one specimen of the urine sample was required for the purposes of undergoing an examination. That being the case, it was not incumbent in law to collect two bottles of urine sample as contended by learned counsel.

**[18]** Learned deputy went on to contend that the IGSO F103 and the KKM Guidelines Bilangan 6/2002 were both administrative orders or guidelines and they had no force of law. Learned deputy gave the example, the guidelines in the English case of *R v Turnbull and others* [1976] 3 All ER 549 — commonly called *Turnbull guidelines*. It was said that the *Turnbull guidelines* did not lay down any proposition of law embodied in concrete. The propositions in *Turnbull* were mere guidelines and did not amount to inflexible rules: see *Erivesto Anderson & Anor v Public Prosecutor* [2009] 1 MLJ 593 and *Mohamad*

*Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241.

**[19]** Learned deputy also referred us to the decision of the civil case of *Unilever (M) Holdings Sdn Bhd v So Lai @ Soo Boon Lai & Anor* [2015] 4 MLJ 326. In allowing the appeal and setting aside the orders of the court below in respect of the award of compensation in lieu of reinstatement, the Federal Court, inter alia, held number (4):

> (4) The Industrial Court's Practice Note No 1 of 1987 was an internal administrative circular meant to be a guideline in calculating compensation. It did not have the force of law and could not be construed as a statement of a legal principle. The practice note could not be taken to be a concept stipulating that it was carte blanche to award compensation in all cases in lieu of reinstatement. The Practice Note was, in any case, silent on the issue of whether a workman was still eligible to be reinstated at the time the award was made (see para 26).

**[20]** At the risk of being repetitive, the IGSO F103 and the KKM Guidelines Bilangan 6/2002 were argued by learned deputy that they were administrative orders or guidelines which governed or regulated the internal business of the government departments.

**[21]** Learned deputy said that the evidence of *pegawai sains kimia hayat*, PW3 should be accepted on its face value as there was no evidence produced by the appellant to contradict the findings of PW3. In support of her contention, the case of *K Saravanan a/l S Karuppiah v Public Prosecutor* [2002] 3 MLJ 465 was cited. It was asserted that the chemist did not comply with the provisions of s 37(j) of the Dangerous Drugs Act when taking samples of the drug for analysis. On this issue, the trial judge concluded:

> I had considered appellant's counsel's submission on the infirmities of the chemist's analysis on the subject drugs and found them to be without merit. The court was satisfied that the analysis was properly undertaken and concluded it to be without any flaw. There was no evidence from any expert to contradict the chemist's finding, it must therefore be accepted at face value as true and accurate (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492).

**[22]** Finally, the learned deputy prayed that the concurrent findings of the lower courts should not be disturbed by us as the appellant's conviction was safe.

## THE APPEAL

**[23]** In the instant case, leave was granted by this court to ventilate important issue of law as follows:

Whether the prosecution has failed to comply the procedures of collecting urine sample in accordance with:

(i) IGSO F103 item 8 of the Drug Dependants (Treatment and Rehabilitation) Act 1983;

(ii) KKM Guidelines Bilangan 6/2002 — the guidelines for testing drugs of abuse in urine.

and its legal effect.

**[24]** The IGSO F103 relates to the obligation of suspected drug defendants to submit himself and to undergo the test procedures. The title of the IGSO F130 and its introduction reads as follows:

PTKPN F103 (IGSO F103)

AKTA PENAGIH DADAH

(RAWATAN DAN PEMULIHAN) 1983

1. PENDAHULUAN

Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 (Pindaan 1998) digubal bertujuan untuk memberi rawatan dan pemulihan kepada penagih-penagih dadah. Selain merupakan proses rawatan lanjutan yang menitikberatkan pengawasan ke atas penagih-penagih bertujuan memastikan mereka tidak mengulangi tabiat penagihan mereka. PTKPN ini adalah *bertujuan untuk memastikan segala tindakan ke atas orang-orang kenaan dilakukan mengikut peruntukan-peruntukan yang ditetapkan di bawah Akta ini*.

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8. TATACARA MENGAMBIL CONTOH AIR KENCING

Tatacara pengambilan contoh air kencing dari penagih-penagih yang disyaki adalah seperti berikut:-

8.1 CONTOH AIR KENCING DIAMBIL SEGERA SELEPAS TANGKAPAN

Contoh air kencing dari penagih-penagih yang disyaki hendaklah diambil seberapa segera sebaik sahaja selepas tangkapan bagi menentukan keberkesanan ujian.

8.2 PEMILIHAN 2 BUAH BOTOL OLEH PENAGIH YANG DISYAKI

*Setiap penagih dadah yang disyaki HENDAKLAH diberi sebanyak dua buah botol plastik kosong yang dikhaskan serta baru dan belum pernah digunakan lengkap dengan penutupnya. Penagih berkenaan hendaklah diberi peluang memilih sendiri botol-botol plastik tersebut daripada kotak simpanannya serta ia berpuas hati dengan botol-botol tersebut berkeadaan bersih dan boleh digunakan. Sebuah botol air kencing adalah untuk tujuan ujian awal di peringkat polis jika perlu dan sebuah lagi untuk dihantar*

*ke hospital bagi penganalisaan*. (Emphasis added.)

**[25]** The full text of the IGSO F103 can be found in Tab 1 of the appellant's bundle of authorities.

**[26]** The KKM Guidelines Bilangan 6/2002 was issued by Bahagian Perkembangan Perubatan Kementerian Kesihatan Malaysia. Its title and introduction read as follows:

GARIS PANDUAN BAGI UJIAN PENGESANAN PENYALAHGUNAAN

DADAH DALAM AIR KENCING

GUIDELINES FOR TESTING DRUGS ABUSE IN URINE

Introduction

(a) This guidelines is intended to be used by all agencies involved in the National Drug Detection Programme and is not applicable to clinical testing;

(b) It describes procedures that shall fulfil the necessary criteria in order to guarantee optimum validity of drug detection results;

(c) Consideration shall be given to the procedures for collection, transportation, analysis, reporting of results, dispatching of results and storage of samples and records;

(d) This guideline shall be read together with the 'Manual For The Laboratory Detection of Drugs of Abuse in Urine and Guidelines on Cold Turkey Detoxification and Treatment' 1988. Wherever there is any discrepancy of the fact, the present guidelines shall be referred;

**[27]** The relevant part of 'KKM Guidelines Bilangan 6/2002' which was drawn to our attention is item (c) *Collection Procedure*. It reads as follows:

(c) Collection Procedure

(i) At least 30 ml urine sample *SHALL* be collected in one bottle or *duplicate if screening and confirmation are done in two different places*. The requesting officer/referring centre shall keep the second urine sample and shall send the urine sample to the confirmation centre if the screening result is positive;

(ii) Both the collection personnel and the donor shall keep the urine samples in view at all times prior to it being sealed or labelled. If the second bottle cannot be provided (sample is 30 ml only), testing shall be done on the first sample. Absence of second sample shall be recorded;

(iii) At the collection site, if the volume is less than 30 ml, the donor may be given a reasonable amount of liquid to drink e.g. 240 ml of water every 30

minutes, but not to exceed a maximum of 720 ml. The second urine sample shall be collected and mixed with the previous sample, by the donor himself/herself or the collection personnel in front of the donor. (Emphasis added.)

**[28]** The full text of 'KKM Guidelines Bilangan 6/2002' can be found in Tab J in the appellant's bundle of authorities.

**[29]** Learned counsel submitted that the IGSO F103 requires two empty and clean plastic bottles be used for collecting urine sample from the suspected drug defendants. The suspect should be given the choice to select the two bottles. The first bottle of urine sample is to be used for screening purposes by the police. The second bottle of urine sample is to be sent to the hospital for confirmation test after the first bottle is positive for drug. The second bottle must be properly sealed and secured.

**[30]** According to the KKM Guidelines Bilangan 6/2002, the urine sample must be at least contain 30ml. The *first bottle* is used for screening test. If the screening result is positive, the *second bottle* of urine sample which is kept by the requesting officer, in this case, Insp Letter Lee, PW4, will be sent to the confirmation centre which is Hospital Kuala Lumpur Dadah-Penyelidikan, Jabatan Patologi for confirmation test. However, take note that in this case, the screening test was conducted earlier by PW1 at the Temerloh Police Station (the screening test and the confirmation test are at two different places).

**[31]** Learned counsel went on to submit that in this case, only one bottle of the appellant's urine sample was taken for screening purposes and the balance of his urine in the same bottle was sent to Kuala Lumpur Hospital. This procedure was clearly in contravention of the KKM Guidelines Bilangan 6/2002 and also an international procedure of collecting two bottles of urine sample (see discussion below).

**[32]** Learned counsel invited this court to take judicial notice of anti-doping law at international scene in the field of sports. 'Doping' refers to an athlete use of prohibited drugs or methods to improve training and sporting results and include the refusal to take a drug test or an attempt to tamper with doping controls. At international level, two urine samples are required to be taken. This is exemplified in the Badminton World Federation ('BWF') where our former badminton player, Saiful Amar Ayob was suspended in badminton competition in Malaysia and Korean Open 2007. This is because his sample A urine taken in October 2006 was positive for an anti-inflammatory drug dexamethasone, a prohibited substance. However, upon the request of Saiful

Amar Ayob, the World Doping Agency ('WADA') made a second analysis on his sample B urine which test was found to be negative. Thus, his suspension was revoked.

**[33]** A different story happened to Datuk Lee Chong Wei, our number one badminton player. In 2014 his urine was also found to be positive for dexamethasone in both samples A and B. He was suspended from badminton competition for eight months by BWF.

**[34]** Another sport's personality is our legendary bodybuilder, Sazali Samad has been handed a four year suspension by the Malaysian Bodybuilding Association ('PBMM'), after failing a doping test in early 2015. The said bodybuilder opted not to challenge the second sample ie *sample B* of the test as he accepted the suspension by claiming that he merely took a supplement product from a friend, without referring it to the National Sport Institute ('ISN') prior to his consumption.

**[35]** Learned counsel's summed up his submission by saying that the appellant who was a member of the police force was deprived of a confirmation test of his sample B urine which was not taken or adhered to. The non-compliance of the IGSO F103 and/or the KKM Guidelines Bilangan 6/2002 had caused prejudice and being unfair to the appellant. The appellant was entitled to an acquittal.

OUR DECISION

**[36]** According to learned counsel for the appellant, the IGSO F103 and the KKM Guidelines Bilangan 6/2002 had the force of law. Hence, its non-compliance was fatal to the prosecution's case. No reason was furnished by the appellant for taking the view that the IGSO F103 and the KKM Guidelines Bilangan 6/2002 had the force of law. The non-compliance of the IGSO F103 and the KKM Guidelines Bilangan 6/2002 were vigorously challenged by the appellants in both levels of the court below — the magistrate court and the High Court. However, learned deputy took the opposite stand in that the IGSO F103 and the KKM Guidelines Bilangan 6/2002 were mere administrative orders or guidelines which had no force of law. That being the case, argued by the learned deputy that its non-compliance would not be fatal to the prosecution's case.

**[37]** Learned deputy's reliance on the authorities of *Erivesto Anderson & Anor*, and *Mohammad Yazri bin Minhat*, relating to the *Turnbull* guidelines are misplaced as compliance with the *Turnbull* guidelines are not mandatory as

they have no force of law. The application of the *Turnbull* guidelines are dependant on the fact of each individual case. In the instant case, the requirement of two bottles urine sample were mandatory. The word 'SHALL' (hendaklah) was employed in the IGSO F103 and the KKM Guidelines Bilangan 6/2002 to indicate its mandatoriness. Whilst the case of *Saravanan a/l S Karuppiah*, where the trial judge accepted the chemist evidence at face value as there were no other expert was produced to contradict the chemist findings. Again, in this case there is nothing for the appellant to contradict as the confirmation test of the second bottle was not taken. On this point the prosecution's case failed in limine. As regard the case of *Unilever (M) Holding Sdn Bhd*, it is a civil case. It is not a criminal case which involved a constitutional guaranteed right which requires a fair trial to be accorded (see discussion below). Thus, all the authorities relied by learned deputy are inapplicable and distinguishable on facts.

**[38]** Now, we come to consider whether the IGSO F103 has the force of law. We refer to the Federal Court case of *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 272 *where the issue of an admissibility of police station diaries was made an issue. In his submission the Public Prosecutor contended that*:

> ...the station diaries are kept by virtue of administrative orders called *standing orders made by the Inspector-General of Police under* s 97 of the Police Act 1967.

**[39]** There are several standing orders covering various police jobs such as the maintenance of station diaries, the procedure to hold an identification parade in criminal cases which is regulated by the IGSO Part D 226, and the procedure to collect urine samples from suspected drug dependants which is housed in the IGSO F103. The standing orders made by the Inspector-General of Police, which necessarily include the IGSO F103 acquires its statutory power from s 97 of the Police Act 1967. Therefore, it has the force of law.

**[40]** The KKM Guidelines Bilangan 6/2002 under the caption 'Urine Collection' has made reference to the Dangerous Drugs Act 1952. The scheme of the KKM Guidelines Bilangan 6/2002 was formulated in collaboration with the Dangerous Drugs Act 1952 and also the Drug Dependants (Treatment and Rehabilitation) Act 1983.

**[41]** Section 31 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 provides:

> The Dangerous Drugs Act 1952 is amended by inserting immediately after section 38 new sections 38A and 38B as follows:

38A(1) Powers of Court in respect of drug dependants below the age of eighteen

Where any person below the age of eighteen years is found guilty of an offence against this Act other than in the case of an offence under section 6B or 39B or other than in a case where a person is found guilty of an offence against this Act for which the punishment shall be under section 39A, *the Court shall consider a report of a Rehabilitation Officer as defined in the Drug Dependants (Treatment and Rehabilitation) Act 1983 [Act 283]* and if the Court is satisfied that such person is a drug dependant as certified by a government medical officer and that having regard to the circumstances of the case and the character, antecedents, health or mental condition of the person charged it is inexpedient to inflict the punishment provided, the Court may, with or without recording a conviction —

(a) release the offender and order him to reside at a Rehabilitation Centre for a period of two years to undergo treatment and rehabilitation, and immediately thereafter to under after-care in accordance with the provisions of the *Drug Dependants (Treatment and Rehabilitation) Act 1983*; and

(b) order the offender to be placed under the supervision of a Rehabilitation Officer for a period of not less than two and not more than three years, and to execute a bond with or without sureties, as the Court may determine, to remain under such supervision for such period:

Provided that where such person fails to execute such bond, an order under paragraph (a) shall be made against him by the Court.

(2) *Where an order under paragraph (1)(a) is made against an offender, it shall be deemed to be an order made by a Magistrate under paragraph 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983, and where the order is made under paragraph (1)(b), it shall be deemed to be an order made by the Magistrate under paragraph 6(1)(b) of the Act, and the provisions of that Act shall apply accordingly in relation to such order*.

38B(1) Powers of Court in respect of person found guilty under section 15

Where a person is found guilty or an offence under section 15, he shall immediately after having undergone the punishment imposed upon him in respect thereof, *undergo supervision by a Rehabilitation Officer as defined under* subsection 2(2) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 *for a period of not less than two and not more than three years as may be determined by the Rehabilitation Officer*.

(2) *A person who is required to undergo supervision by a Rehabilitation Officer under subsection (1), shall be deemed to have been placed under such supervision by virtue of an order made by a Magistrate under paragraph 6(1)(b) of the Drug Dependants (Treatment and Rehabilitation) Act 1983, and the provisions of that Act shall apply accordingly in relation to such supervision.* (Emphasis added.)

**[42]** Thus, s 31 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 must be read conjointly with ss 38A and 38B of the Dangerous Drugs Act

1952. Therefore, the KKM Guidelines Bilangan 6/2002 which is formulated in line with both of the aforesaid Acts and therefore it has the force of law.

**[43]** Similarly, the IGSO F103 was also formulated with its objective 'bertujuan untuk memastikan segala tindakan ke atas orang-orang kenaan dilakukan mengikut peruntukan-peruntukan yang ditetapkan di bawah *Akta ini*'. This Act (*Akta ini*) refers to the Drug Dependants (Treatment and Rehabilitation) Act 1983. Therefore, arguably the IGSO F103, like KKM Guidelines Bilangan 6/2002, is also has the force of law, quite apart from acquiring its statutory power under s 97 of the Police Act 1967.

**[44]** Further, neither learned JC, nor the parties before the High Court considered or addressed on the issue of constitutionality. The Federal Constitution is the supreme law of the land. The articles provide as follows:

> Article 5(1) provides —
>
> 'No person shall be deprived of his life or personal liberty save in *accordance with law*'.
>
> Article 8(1) provides —
>
> 'All persons are equal before the law and entitled to equal protection of the law'. (Emphasis added.)

**[45]** In the Federal Court case of *Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108, according to Lee Hun Hoe CJ (Borneo) the expression 'in accordance with law' in art 5(1) of our Constitution is said to be wide enough to include *procedural law*.

**[46]** In *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631, Gopal Sri Ram FCJ concurred with the view of Lee Hun Hoe CJ in *Re Tan Boon Liat*. Before we deal with the constitutional principles in *Lee Kwan Woh*, let us consider its factual pattern:

> The accused was convicted by the High Court for trafficking of drugs under s 39B(1)(c) of the Dangerous Drugs Act. He was sentenced to death. His appeal to the Court of Appeal was dismissed. He took up a further appeal to the Federal Court. One of the grounds of appeal was that, *the trial judge ruled that he did not wish to hear the accused's submission at the close of the prosecution case as he was satisfied that a prima facie case under s 180(1) of the Criminal Procedure Code has been made out by the prosecution.*
>
> The accused contended that he had a constitutionally guaranteed right to a fair procedure by virtue of s 5(1) of the Federal Constitution and the trial judge's ruling had violated this right.
>
> Having considered the rule of construction of the Federal Constitution and several

other authorities including the judgment in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, when dealing with arts 9 and 12 of Singapore Constitution which are identical to arts 5 and 8 of our Constitution respectively, *Lord Diplock* said:

> In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as '*in accordance with law', 'equality before the law', 'protection of the law*' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules.

*Gopal Sri Ram FCJ* concluded that '*it is clear from this passage the rules of natural justice, which is the procedural aspect of the rule of law, is an integral part of Articles 5(1) and 8(1). In short, procedural fairness is incorporated in these two articles*'. (Emphasis is added.)

**[47]** In the present case, it is inaccurate for learned JC to say that the collection of urine sample from drug dependants for examination is governed by s 31A of the Act. And s 31A of the Act is silent on the taking of two bottles of urine sample and its test procedures. Learned JC ruled that the IGSO F103 is irrelevant and it does not bind the court in arriving at its findings or making its decisions. We must bear in mind that s 31A of the Act is a general provision dealing with the arrested person *to provide a specimen of the urine for the purposes of an examination*. Whilst the IGSO F103 and the KKM Guidelines Bilangan 6/2002 are specific standing orders and *guidelines dealing with the procedures for collecting and testing of drugs abuse in urine*.

**[48]** We were, however, in agreement with learned counsel that the appellant had lost the opportunity for a confirmation test as only one bottle of urine sample was collected from the appellant, whilst the IGSO F103 and KKM Guidelines Bilangan 6/2002 require two bottles of urine sample be taken. In the field of sports at international level, the taking of two bottles of urine sample from athlete or sportman/sportwoman is consistent with the *World Anti-Doping Code*. According to an article entitled '*International Convention Against Doping In Sport*' (http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/), it was written, inter alia:

> *Taking the sample*
>
> The sample is then split between *two bottles labelled A and B* with a unique sample code number. The Doping Control Officer provides the athlete with instructions on how to inspect the sample collection kit, distribute the sample between the A and

B bottles, secure the samples and complete the paper work. A

*The sample shipping*

All samples are sent to a WADA accredited laboratories.

**[49]** On the facts of this case, a constitutional guaranteed right of the appellant had been transgressed. Gopal Sri Ram FCJ in *Lee Kwan Woh* said, inter alia, that an accused person in a criminal trial is entitled to a fair trial. Any breach of his constitutional guaranteed rights entitled him to be set free: B

> Whether an impugned state action is substantively or procedurally fair must depend on the fact pattern of each case. However, when the principle is applied to a *criminal case*, what it means is that an accused has a constitutionally guaranteed rights to receive a *fair trial* by an impartial tribunal and to have a just decision on the facts. *If there is an infraction of these rights, the accused is entitled to an acquittal*. C

D

**[50]** The appellant was deprived of the procedural law which gives him of the right of a second test — confirmation test. The magistrate and learned JC, by ruling that one bottle of the appellant's urine sample was sufficient, was contrary to the IGSO F103 and the KKM Guidelines Bilangan 6/2002. The appellant, accordingly, did not have a fair trial and arts 5(1) and 8(1) were violated. The appellant did not get what the procedural law said he should get. He had lost a chance of being acquitted which was reasonably opened to him. Thus justice has been miscarried — commonly called 'miscarriage of justice'. Justice is justice in accordance with law as enshrined in arts 5(1) and 8(1) of the Federal Constitution. The High Court case of Australia in *Mraz v The Queen* (1955) 93 CLR 493 was referred to by Gopal Sri Ram FCJ in *Lee Kwan Woh*, where Fullagar J said at p 514 in the following terms: E F

> ... every accused person is entitled to a trial in which *the relevant law is correctly explained* to the jury and *the rules of procedures and evidence are strictly followed*. If there is any failure in any of these respects, and the appellant may thereby have *lost a chance which was fairly opened to him of being acquitted*, there is, in the eye of the law, *a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law*. (Emphasis added.) G H

## CONCLUSION

**[51]** Having considered the issues of law raised, the facts and the circumstances of this case, we were unanimous that the appellant's conviction was erroneous and not safe. We allowed the appellant's appeal and set aside his conviction and sentence. The appellant was accordingly acquitted and discharged. I

A *Appeal allowed; appellant's conviction and sentence set aside; appellant acquitted and discharged.*

Reported by Dzulqarnain Ab Fatar

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